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No. 86-24

In the Supreme Court of the United States

OCTOBER TERM, 1986

TELFORD S. EGGLESTON, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners contend that the court of appeals erred in affirming the Tax Court's decision that "pre-filing notification letters" sent to them by the Commissioner were not "notices of deficiency" as specified in Section 6212(a) of the Internal Revenue Code,[1] and hence that the Tax Court under Section 6213(a) lacked jurisdiction to entertain their suits.

1. The Internal Revenue Service has instituted a comprehensive program to combat abusive tax shelters. As part of this program, when the IRS identifies a tax shelter that it believes to be abusive, it sends letters to investors in that shelter advising them of that fact. Such letters, as the Tax

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[1]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

Court observed below, are commonly called "pre-filing notification letters." 84 T.C. 1308, 1309 (1985).[2] These letters typically state that the investor's tax return will be reviewed to ascertain whether he has claimed any deductions or credits arising out of the abusive tax shelter, and that, if he has claimed such deductions or credits, his return will be audited (Pet. App. 5a). These letters further advise that any such deductions or credits claimed by him will be disallowed (*id.* at 4a). The purpose of such "pre-filing notification letters" is to deter taxpayers who have not yet filed their returns from claiming the tax shelter deductions and credits, and to encourage taxpayers who already have filed returns to file amended returns. See Rev. Proc. 83-78, 1983-2 C.B. 595; Rev. Proc. 84-84, 1984-2 C.B. 782.

Petitioners were investors in a tax shelter known as the "Liberty Financial 1983 Government Securities Trading Strategy." On November 2, 1984, the IRS sent notification letters to petitioners and the other investors in that tax shelter. These letters advised petitioners that the IRS believed that the purported deductions and credits generated by the shelter were not allowable, that the IRS intended to review petitioners' returns to ascertain whether they had claimed any such deductions or credits, and that, if they had, their returns would be audited and such deductions and credits would be disallowed. Pet. App. 4a-6a.[3] These letters did not purport to be "notices of deficiency" as specified in Section 6212(a). The letters did not state that petitioners' tax returns had been examined; the letters did

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[2]The Tax Court's opinion is not reprinted either in the appendix to the petition or in the supplemental appendix that petitioners filed. We are herewith lodging with the Court ten copies of the Tax Court's opinion, reported at 84 T.C. 1308.

[3]Petitioners in fact had filed their returns for 1983 prior to receiving the notification letters (Pet. App. 4a).

not assert that a deficiency had been determined in petitioners' taxes for any particular taxable year; and the letters consequently did not specify any amount of tax as being deficient. See Pet. App. 5a-6a.

Petitioners nonetheless joined with 108 of the other investors in the "Liberty Financial" tax shelter who had received such notification letters in filing a consolidated petition to the Tax Court for redetermination of "deficiencies" allegedly asserted in those letters. The IRS moved to dismiss the petition for lack of jurisdiction on the ground that the Commissioner's issuance of a "notice of deficiency" is a precondition to the Tax Court's jurisdiction and that the pre-filing notification letters were not "notices of deficiency." The Tax Court granted the motion and dismissed the consolidated petition. 84 T.C. 1308 (1985).

Petitioners appealed, and the court of appeals unanimously affirmed (Pet. App. 1a-14a; 787 F.2d 939). The court of appeals explained that it was clear from the face of the notification letters that the Commissioner had not yet even looked at petitioners' returns, much less examined them to determine whether there existed any deficiencies in their taxes. The court further observed that, contrary to petitioners' claim, dismissal of their Tax Court petition for lack of jurisdiction did not deprive them of their right to litigate in that forum. Petitioners remain free to institute litigation in the Tax Court if and when the Commissioner audits their returns, determines deficiencies in their taxes, and sends them true "notices of deficiency." Pet. App. 8a-9a.

2. The decision below clearly is correct and does not conflict with the decision of any other court. Indeed, because the investors in the tax shelter involved here are scattered nationwide, the precise question before the Tax Court in the instant case has been presented on appeal from its judgment to nine courts of appeals. All seven circuits that

have rendered decisions thus far have affirmed the Tax Court's holding that the notification letters sent to petitioners and their fellow investors were not "notices of deficiency." *Neal* v. *Commissioner*, No. 85-4147 (2d Cir. Mar. 17, 1986) (unpublished order), petition for cert. pending, No. 86-38; *Donley* v. *Commissioner*, 791 F.2d 383 (5th Cir. 1986), petition for cert. pending, No. 86-292; *Becker* v. *Commissioner* (7th Cir. Aug. 11, 1986) (unpublished order); *Spector* v. *Commissioner*, 790 F.2d 51 (8th Cir. 1986), petition for cert. pending, No. 86-210; *Alford* v. *Commissioner*, No. 85-2390 (10th Cir. Aug. 26, 1986); *Benzvi* v. *Commissioner*, 787 F.2d 1541 (11th Cir. 1986), petition for cert. pending, No. 86-148.[4] There is plainly no reason for further review by this Court.[5]

The issuance by the Commissioner of a "notice of deficiency" is an absolute precondition to Tax Court jurisdiction. See *Commissioner* v. *Gooch Co.*, 320 U.S. 418, 420 (1943); *DaBoul* v. *Commissioner*, 429 F.2d 38 (9th Cir. 1970); T. C. R. 13. A "deficiency" is defined in Section 6211(a) as the amount by which the tax imposed by the Code—that is, the correct amount of tax—exceeds the amount of tax shown by the taxpayer on his return. When the Commissioner examines a return and determines a deficiency in tax, he generally may not proceed to assess or collect any additional tax until after he has sent the taxpayer a "notice of deficiency" advising the taxpayer of his determination. I.R.C. §§ 6212(a), 6213(a). The mailing of the notice of deficiency commences the 90-day period

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[4]Appeals are still pending in two circuits. *Gaska* v. *Commissioner*, No. 85-1744 (6th Cir.); *Abrams* v. *Commissioner*, No. 85-7526 (9th Cir.).

[5]This Court has previously denied certiorari in a case in which the promoters of an abusive tax shelter unsuccessfully challenged the "prefiling notification" program on due process grounds. *Western Reserve Oil & Gas Co.* v. *New*, 765 F.2d 1428 (9th Cir. 1985), cert. denied, No. 85-681 (Jan. 13, 1986).

during which the taxpayer may file a petition in the Tax Court for a "redetermination" of the asserted deficiency. I.R.C. § 6213(a).

"A statutory notice of deficiency consists of a letter stating the amount of the deficiency and a summary statement showing how the deficiency was computed." M. Saltzman, *IRS Practice and Procedure* ¶ 10.03[2][a], at 10-12 (1981) (footnote omitted). Although the Internal Revenue Code prescribes no particular form for a "notice of deficiency," it is well settled that such a notice at a minimum must fairly advise the taxpayer that the Commissioner has examined his return and has determined a deficiency in tax for a particular year, and must specify the amount of such deficiency. See, *e.g., Donley* v. *Commissioner*, 791 F.2d at 384-385; *Commissioner* v. *Stewart*, 186 F.2d 239, 242 (6th Cir. 1951). The notification letters in question here were sent, pursuant to Rev. Proc. 83-78, *supra*, to encourage investors in the "Liberty Financial" tax shelter to file amended returns deleting any deductions or credits attributable to that investment. The letters did not purport to advise petitioners that deficiencies in their taxes had been determined and did not specify any amount of tax as being deficient. Indeed, the letters made it "pellucidly clear" (Pet. App. 8a) that no examination of petitioners' tax returns had even been made.

Contrary to petitioners' contention (Pet. 31-32), the amount of a deficiency cannot be calculated from the notification letters. It is by no means certain that, upon examination of petitioners' returns, the Commissioner will determine that a deficiency exists for any particular year. Alternatively, if a deficiency in tax is ultimately determined, the amount of that deficiency may reflect, not only adjustments stemming from disallowance of the deductions and credits referred to in the notification letters, but adjustments stemming from other items wholly unrelated to petitioners' investment in the "Liberty Financial" tax shelter.

See Pet. App. 9a-10a; *Benzvi* v. *Commissioner*, 787 F.2d at 1543. Indeed, as the court of appeals pointed out (Pet. App. 11a-13a), if petitioners are correct that the notification letters should be treated as notices of deficiency, the result would be that other investors in the "Liberty Financial" tax shelter would be time-barred from filing Tax Court petitions if and when they receive actual notices of deficiency. Accordingly, the court of appeals correctly concluded that these letters do not constitute notices of deficiency, and hence that they fail to provide the requisite basis to invoke the Tax Court's jurisdiction.

Petitioners' contention (Pet. 41-44) that the Tax Court's decision denies them due process is frivolous. Because the notification letters are not notices of deficiency, the Commissioner cannot attempt to assess or collect any additional taxes on the basis of those letters. See I.R.C. § 6213(a). Petitioners will have full opportunity to obtain review in the Tax Court should the Commissioner ultimately determine a deficiency in their tax and mail them an actual notice of deficiency. Their attempt to "jump the queue" (Pet. App. 13a) and proceed in the Tax Court in advance of any such determination is without foundation.[6]

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[6]It is not entirely clear what petitioners hope to gain by their premature rush to the Tax Court. Conceivably, they may be seeking to frustrate the Commissioner's ability to examine in orderly fashion those aspects of their tax returns other than the "Liberty Financial" tax-shelter items referred to in the pre-filing notification letters. As a general rule, once the Commissioner has mailed a "notice of deficiency" and the taxpayer has filed a timely petition in the Tax Court, the Commissioner is barred from sending the taxpayer a second "notice of deficiency" for the same tax (*e.g.*, income or estate tax) for the same taxable year. I.R.C. § 6212(c). The Tax Court does have jurisdiction to redetermine a deficiency in an amount larger than that stated in the notice of deficiency. I.R.C. § 6214(a). Whereas the burden of proof in the Tax Court is generally on the taxpayer, however, the burden shifts to the Commissioner on increased deficiencies and on "new matters" not mentioned in the notice of deficiency. T. C. R. 142(a). Thus, by seeking to treat the

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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pre-filing notification letters, which refer exclusively to the "Liberty Financial" tax-shelter items, as "notices of deficiency," petitioners may be attempting to shift the burden of proof to the Commissioner on any other adjustments that the IRS may propose after completing its examination of their tax returns. See Pet. 22-23.

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